

RECEIVED

MAR 19 2009

OPINION COMMITTEE

CRIMINAL DISTRICT ATTORNEY
CALDWELL COUNTY, TEXAS
201 E. SAN ANTONIO STREET
P. O. BOX 869
LOCKHART, TEXAS 78644
(512)-398-1811 (512)-398-1814 FAX

FILE # ML-46028-09

I.D. # 46028

March 11, 2009

Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0787-GA

Re: Request for Opinion

Dear General Abbott:

Pursuant to Texas Government Code section 402.043, I request your written opinion regarding the following issue:

Are premiums paid for group health insurance by the Caldwell County Employee Benefit Trust ("Trust") subject to insurance premium taxes under Texas Insurance Code section 222.002?

I have investigated this question and am submitting to you my conclusion as well as supporting authorities and ask that you issue your opinion.

Background Information

In order to provide health benefits coverage to County officials, employees, and retirees, and their dependents ("covered individuals"), Caldwell County, Texas has created a fund in the form of a single nonprofit trust as authorized by Chapter 157 of the Texas Local Government Code. TEX. LOCAL GOV'T CODE ANN. §157.102(a).

Pursuant to Local Government Code Chapter 157, the Trust has opted to provide health benefits by purchasing insurance. In negotiating with the health insurance company ("Company") for rates for health insurance benefits, the Trust advised the health insurance company that it was not necessary for the Company to pass through the cost of premium taxes on this business to the Trust. This advice was based upon two statutes. First, Government Code section 222.002 ("section 222.002") excludes from the calculation of gross premiums for premium tax purposes all premiums paid on group health policies in which the group covered by the policy is a single nonprofit trust established to provide coverage primarily for, *inter alia*, employees of a county. Second, Local Government Code section 157.102 authorizes a county's health benefits fund to take the form of a single nonprofit trust as described in section 222.002. The Company

requested the Comptroller's Office to advise the Company as to whether the health insurance premiums collected by the Company from the Trust could be excluded from the Company's gross premiums for purposes of calculating its premium tax liability. The Comptroller notified the Company that the exclusion does not apply in this case. Therefore, the health insurance policy issued to the Trust includes the premium taxes that the Company will be compelled to pay on the premiums received from the Trust. A copy of the Certificate of Insurance is attached hereto as Exhibit A and incorporated herein for all purposes. The County disagrees with the Comptroller's construction of section 222.002 and her characterization of the County's Declaration of Trust.

Legal Issue Presented

Pursuant to Chapter 222 of the Texas Insurance Code, life, health, and accident insurance companies pay an annual premium tax on gross premiums subject to taxation under Chapter 222. An insurer's taxable gross premiums specifically do not include:

Premiums or revenues paid on group health, accident, and life policies or contracts in which the group covered by the policy or contract consists of a single nonprofit trust established to provide coverage primarily for employees of:

- (A) a municipality, county, or hospital district in this state; or
- (B) a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality; ...

TEX. INS. CODE ANN. §222.022(c)(5) (hereinafter, the "exclusion").

The Caldwell County health benefits trust document provides that it is a "nonprofit trust created for the purpose of providing County officers, employees, and qualified retirees and their dependents with life, disability, sickness, accident, and other health benefits either directly or through the purchase of insurance and to perform operations in furtherance thereof." (Paragraph II of the Caldwell County Declaration of Trust) B copy of the Caldwell County Declaration of Trust is attached hereto as Exhibit A and incorporated herein for all purposes.

The Comptroller has determined that the Caldwell County Trust does not meet the eligibility requirements for the premium tax exclusion. A copy of the Comptroller's determination is attached hereto as Exhibit C and incorporated herein for all purposes. Therein, the Comptroller identifies certain "key requirements" for the exclusion and identifies certain aspects of the Caldwell County Trust that lead her to conclude that the trust agreement is in conflict with the stated purposes of the Trust and to determine that the premiums under the Trust do not qualify for exclusion. Despite the explicit language

Honorable Greg Abbott

March 11, 2009

Page 3

of the trust document itself, the Comptroller has found that the Caldwell County Trust was not established for the "sole purpose" of providing coverage to county employees.¹ Therefore, the Comptroller has advised the County's health insurance carrier that the County's group health insurance premiums are subject to taxation under Chapter 222 of the Texas Insurance Code.

This office contends that the Comptroller's construction of the statute and her construction of the Caldwell County Trust are in error. The group covered by the health insurance policy at issue is a single nonprofit trust established to provide coverage primarily for employees of a county. Therefore, the Chapter 222 exclusion applies, and premiums paid by the Trust for health insurance benefits for its covered individuals are not subject to the state premium tax.

Argument and Authorities

The Comptroller's determination in this matter is contrary to the clear meaning of section 222.002 and ignores completely the effect of Chapter 157 of the Local Government Code.

1. Section 222.022 is a clear and unambiguous statute.

Through her determination, the Comptroller is, in effect, construing section 222.002 in a manner that imposes standards that are not required by the clear language of the statute or by necessary implication. These additional burdens are being imposed not pursuant to a formal rulemaking procedure but informally in response to an email inquiry. While the Comptroller has adopted a rule to implement Insurance Code section 222.002 (34 Tex. Admin. Code § 3.831), this rule simply repeats, verbatim, the requirements of the statute. This rule does not contain any "key requirements" such as are set out in the Comptroller's determination. Because the statute is unambiguous, it should be enforced as written and not enhanced by additional criteria established by the Comptroller, whether on a formal or informal basis. If a statute is unambiguous, it should be interpreted according to its plain meaning. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22 (Tex. 2003). In this case, section 222.002 unambiguously provides that an insurer's taxable gross premiums do not include premiums paid on group health insurance policies in which the group covered by the policy consists of a single nonprofit trust established to provide coverage primarily for employees of a county. Beyond question, the premiums at issue here were paid on a group health insurance policy covering a group that consists only of a single nonprofit trust established to provide health benefits to employees of Caldwell County. In every respect, the Caldwell County Trust complies with the statutory criteria for application of this exclusion.

A. The Comptroller's "key requirements"

¹ The "sole purpose" criterion is strictly the Comptroller's. It does not appear in the statute or in any rule adopted to implement the statute. Nevertheless, it is clear from the County's trust document that providing health benefits coverage is the trust's only purpose.

In her determination, the Comptroller sets out six key requirements that must be met in order for the exclusion to apply. Several of these requirements are not compelled by the statute and conflict with other applicable law.

- (i) "The trust must be established for the sole purpose of paying premiums for group insurance benefits of employees or retirees of a qualifying governmental entity of the state. Disability insurance is considered a form of accident and health coverage, and therefore the premiums for such group coverage may be included for premium exclusion purposes."

This is a departure from the language of the statute in two obvious respects. First, the statute does not use the language "sole purpose." Second, the statute does not require the purpose of the trust to be the payment of premiums for group insurance benefits. Rather, the statute requires the trust be "established to provide coverage primarily for employees of a ...county..." TEX. INS. CODE ANN. §222.002 (c)(5). The Caldwell County Trust provides coverage only to county employees, officers, and retirees and their dependents. While it does so by purchasing a health insurance policy for which it pays premiums, Section 222.002 does not limit its application to only those trusts providing coverage through the payment of premiums for group insurance benefits. Counties are specifically authorized by Chapter 157 of the Local Government Code to create a trust to fund health benefits for covered individuals either by the purchase of insurance, self-funding the benefits, or by creating or joining an intergovernmental risk pool. TEX. LOCAL GOV'T CODE ANN. §157.101(a). Chapter 157 specifically refers to the section 222.002 tax benefit to be available to such a trust. The Comptroller's restrictive interpretation of section 222.002 is in contravention of other applicable law.

In Subchapter F of Chapter 157 of the Local Government Code, counties are authorized to provide for group health and related benefits for specified persons including county employees, officers, and retirees and their dependents. TEX. LOCAL GOV'T CODE ANN. §157.101(a). This statute specifically authorizes a county to provide these benefits by purchasing insurance, by self-funding the benefits, and by operating as an intergovernmental risk pool organized under Chapter 172 of the Local Government Code. *Id.* Further, section 157.102 (a) of the Local Government Code provides, in pertinent part:

... The commissioners court may establish a fund to pay for the group health and related benefits. The fund may take the form of a single nonprofit trust as described by Section 222.002(c)(5)(A), Insurance Code.

TEX. LOCAL GOV'T CODE ANN. §157.102 (a). The reference to section 222.002 in this statute is a clear indication that the Legislature understands and intends that trusts created by counties to fund health benefits, either through the purchase of insurance or by self-funding, are entitled to the benefits of section 222.002. Caldwell County has availed

itself of this statutory authority to create a trust for the purpose of providing health benefits coverages to covered individuals and has done so by purchasing a health insurance policy. The Comptroller's first key requirement is in conflict with applicable law.

- (ii) "Qualifying political subdivisions are municipalities, counties, hospital districts, and county or municipal hospitals."

This requirement is in harmony with section 222.002.

- (iii) "More than one qualifying subdivision may participate in such a "single non-profit trust" for the funding of group insurance benefits. Political subdivisions that do not qualify for the exemption by themselves may participate in the funding of employees and retirees group benefits under a single non-profit trust covering multiple governmental entities as long as the total number of participants covered under the group insurance funded through such a trust, in the aggregate, primarily covers employees and retirees of qualifying governmental entities. 'Primarily' for this purpose means greater than 50 percent of the total participant population covered under the group insurance benefits."

To the extent that the use of the word "primarily" in section 222.002 is subject to interpretation, this requirement seems to be a reasonable interpretation of that word and not in conflict with section 222.002 or other applicable law.

- (iv) "Other than the payment of trust fees and expenses related to the funding of group benefits for employees and retirees, no other expenses may be paid from such a trust."

This wording is not contained in section 222.002 and really begs the question of what fees and expenses are "related to the funding of group benefits." If this key requirement allows the exclusion to apply to a health benefits trust that expends funds to purchase stop loss coverage; hire an auditor, claims counsel, third party administrator, money manager, staff, and other necessary consultants; pay office overhead and employees; purchase hardware and software required to maintain data and comply with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and the myriad of other expenses incurred by any entity providing health benefits coverages, this requirement may be unnecessary but nevertheless consistent with section 222.002. If, on the other hand, the Comptroller is intending this requirement to limit a qualifying section 222.002 trust to only paying health claims and trust fees, this requirement is so limiting that it makes the exclusion completely unavailable to any health benefits trust. No trust that purchases or self-funds health benefits coverage could be so limited in its expenditures and functions.

- (v) "The trustee may invest funds in the trust and pay fund management fees from the proceeds of the investment."

Again, this requirement is simply created by the Comptroller and has no foundation in the language of section 222.002. The disposition of investment earnings, whether they are used to pay claims, to pay operating expenses, to pay management fees, or otherwise is not dictated or restricted by law. To the extent that this key requirement declares ineligible any health benefits trust that uses its investment earnings for anything other than to pay management fees, it is overly restrictive and is a qualification not required by section 222.002.

- (vi) "The trust and the trustee must meet the requirements of being a trust and trustee as defined under Texas law.

The requirement is nothing more than a restatement of general law. Compliance with the Texas Trust Code is presumed when the Legislature references a "trust."

B. The Comptroller's specific concerns

The Comptroller's determination identifies certain provisions in the Caldwell County Declaration of Trust that lead her to conclude that this is not a trust created for the sole purpose of paying premiums for insurance benefits. She cites the Trust's ability to provide errors and omissions coverage for its trustees, the trustees' authority to acquire and manage property, and the availability of trust funds to pay for necessary professional services as well as to pay judgments or settlements arising out of litigation against the trust as provisions of the trust document that are in conflict with its stated purposes and which lead her to conclude that the exclusion does not apply. Without reiterating the discussion about whether this key requirement (sole purpose trust for the payment of premiums) is valid, this analysis by the Comptroller confuses the Trust's purpose with the Trustees' powers. Under section 113.002 of the Texas Trust Code, a trustee may exercise any powers, in addition to those specifically set out in Subchapter A of Chapter 113, "that are necessary and appropriate to carry out the purposes of the trust." TEX. PROP. CODE ANN. § 113.002. All of the powers referred to in the Comptroller's determination that the Caldwell County Trust is ineligible for the tax exclusion are powers necessary and appropriate to carry out the purpose of the trust.

- Trustees are fiduciaries. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568 (Tex. 2006). As such, they have special duties to the beneficiaries of the trust and with respect to handling the property of the trust. It is necessary and appropriate to provide errors and omissions insurance coverage for the trustees to protect them and the trust in the event of claims against them arising from their acts as trustees.

- The Caldwell County Trust was not created for the purpose of owning property. In fact, it owns no property. However, this is a necessary power in the event the Trust joins with other political subdivisions to provide health benefits. Particularly if the trust administers its own claims, it may reach an organizational size that makes it a proper and beneficial use of trust funds to lease or own property for trust offices.
- The ability to engage professional services is an essential power of a trust. Any trust providing of health benefits coverages will need, from time to time, to retain professionals such as attorneys, accountants, and actuaries to ensure the proper functioning of the trust. If the ability to expend trust funds to pay for professional services is a disqualification for the section 222.002 exclusion, it is difficult to imagine a trust that might qualify.
- With respect to the payment of judgments or litigation settlements, this is an absolute necessity for a trust whose purpose it is to provide health benefits coverage. All claims will not be paid. There will be claims litigation, and the Trust may be a party to such litigation. The trust funds must be available to fund the litigation and to pay judgments or settlements.

None of the powers cited by the Comptroller in any way diminish the fact that this Trust has been created for the sole purpose of providing health benefits coverage to County employees. In order to accomplish that purpose, certain powers are necessary and appropriate for the protection of the trust estate and for the proper operation of the trust.

2. Legislative intent is clear that the political subdivisions identified in section 222.002 that create nonprofit trusts in order to provide health benefits to employees are entitled to the exclusion.

What is now section 222.002 was previously article 7064a of the Texas Revised Civil Statutes, article 20A.33(a) of the Texas Insurance Code, and article 4.11 of the Texas Insurance Code. In 1981, the 67th Legislature revised article 7064a to exclude from gross premium receipts for calculation of a company's premium tax liability "the amount of premiums paid on group health, accident and life policies in which the group covered by the policy consists of a single non-profit trust established to provide coverage primarily for municipal employees of this state." This language was added by a Committee Amendment to H.B. 1785 in that session. The House Study Group Bill Analysis of the amendment states that the bill will exempt from the tax the premiums paid by a non-profit trust established to provide group coverage for municipal employees and cites as supporting comments that "applying the premium tax to premiums paid on municipal employees group policies amounts to a tax on municipal government. Cities are exempt from the state sales tax, franchise tax, and motor vehicle tax, and there is no reason they should pay a premium tax on municipal employees' insurance policies." The House

Study Group bill analysis is attached hereto as Exhibit D and incorporated herein for all purposes.


In 1985, in a revision of article 4.11, the exclusion was expanded to include county trusts. The bill analysis of S.B. 1222 which proposed this revision provides this background: "The inadvertent inclusion of county employees in the definition [of gross premiums] has caused the premiums on a similar plan of insurance of county employees to be subject to this tax. Since both categories of employees are public employees, it is felt that the premiums on their insurance should be treated equally." The bill analysis also states that its purpose is to "grant the same exemption from the definition of 'gross premiums' to plans of insurance of county employees that is currently enjoyed by plans of insurance of municipal employees." The Bill Analysis of S.B. 1222 is attached hereto as Exhibit E and incorporated herein for all purposes.

What the Legislature had in mind in creating the exclusion now contained in section 222.002 was to exempt political subdivisions from having to bear the expense of premium taxes. These taxes are passed along to the political subdivisions in premiums charged by insurers providing coverage to the political subdivisions trust. Through her determination, the Comptroller is nullifying the effect of section 222.002 and eliminating this tax exemption for political subdivisions that create trusts for the purpose of providing health benefits to employees.

Conclusion

The Comptroller's informal determination that the Caldwell County health benefits trust does not qualify for the section 222.002 tax exemption is an improper construction of the statute and inconsistent with that law and other applicable law.

Respectfully submitted,



Richard R. Hicks, III
Criminal District Attorney
Caldwell County, Texas